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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ABEL ORTEGA MENDOZA,

Defendant and Appellant.

C061746

(Super. Ct. No.
06F10385)

A jury found defendant Abel Ortega Mendoza guilty of assault with a deadly weapon (Pen. Code § 245, subd. (a)(1))¹ and battery causing serious bodily injury (§ 243, subd. (d)), and found he personally inflicted great bodily injury on a nonaccomplice (§ 12022.7, subd. (a)). The court sentenced defendant to two years in state prison and imposed specified fees and fines.

Defendant appeals, contending (1) the court abused its discretion when it admitted certain prosecution exhibits, and

¹ All further statutory references are to the Penal Code unless otherwise indicated.

(2) the court committed error by applying Government Code section 70373 retroactively to impose two \$30 assessments. We will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and the victim, Donis Castillo, lived in the same apartment complex. At approximately 8:00 p.m. on August 5, 2006, Castillo was standing in the parking lot of the complex making a telephone call. Defendant walked toward him, hitting the fence with a piece of metal as he walked. Castillo moved to the side and then felt a blow to his head as defendant struck him with the metal object. Castillo fell to the ground and briefly lost consciousness.

When Castillo regained consciousness, he saw defendant standing near him with a metal socket wrench approximately 16 inches in length in his hand. Castillo was bleeding. He got up and ran to a nearby market, where someone called 911. Police arrived, and after Castillo gave them a brief explanation of what happened,² he was transported by ambulance to the hospital, where he was treated and released approximately three hours later. The injury left Castillo with a scar and a dent on his forehead.

Defendant was arrested and charged with assault with a deadly weapon (§ 245, subd. (a)(1)) and battery causing serious bodily injury (§ 243, subd. (d)). The charging document alleged

² Castillo's roommate and brother-in-law, Gustavo "Joaquin" Vargas, translated what Castillo said for the police.

defendant personally inflicted great bodily injury on a nonaccomplice. (§ 12022.7, subd. (a).)

At trial, Castillo testified that he saw defendant daily and always greeted him, and never had any conflict with him. Castillo denied ever teasing defendant or calling him gay, and denied doing anything to provoke him prior to the incident. Castillo also denied being armed with a knife or any type of weapon on the night of the attack.

The prosecution showed Castillo People's exhibit 9, a metal tool. Castillo explained that the tool was similar to the tool defendant used to hit him, but differed in some respects. He described the tool defendant used as having a thinner handle, and noted that exhibit 9 had an adjustment ring at the head of the ratchet that was not present on the tool used by defendant.

Detective Jason Manning testified that he interviewed defendant approximately 11 days after the incident. Defendant told Manning he hit Castillo once in the head with a ratchet because Castillo had teased defendant and accused him of being gay when defendant refused to have sex with a particular girl. During the interview, defendant pulled a 10- to 12-inch long ratchet from his toolbox and showed it to Manning, explaining that it was similar to, but half as long as, the one he used to hit Castillo. Defendant told Manning his problems were solved after hitting Castillo because "nobody talked bad about him anymore." He did not mention that Castillo pushed him to the ground or that he feared for his safety because he felt Castillo was going to pull a knife on him. Manning was shown exhibit 9

and confirmed that it appeared to be "roughly the same type of tool" as the one defendant showed him.

Defendant testified that he was working on a car the day of the incident when Castillo walked past him and called out to him. When defendant turned around, Castillo was grabbing his genitals in front of defendant's children. Castillo told defendant he thought defendant was a "faggot" and liked men because defendant refused to have sex with a particular woman. Defendant, holding the ratchet, told Castillo to calm down and said, "I don't play like that." Castillo became angry and pushed defendant to the ground and said, "What you gonna do, faggot?" Defendant thought Castillo was trying to pull a knife from his waistband, so he hit Castillo in the head, then walked away and put the ratchet in his toolbox.

After the incident, defendant spoke with Detective Manning and showed him a ratchet similar to, but shorter than, the one he used to hit Castillo. Defendant told Manning he hit Castillo with the ratchet because Castillo "was acting like he thought [defendant] was gay" and would cover his genitals whenever defendant walked past. He denied ever telling Manning he was happy he hit Castillo or that hitting Castillo solved all of his problems.

When shown exhibit 9, defendant confirmed it was approximately the same size as the ratchet he used to hit Castillo. He testified that he hit Castillo because Castillo pushed him to the ground and he thought Castillo was going to hurt him.

The jury found defendant guilty as charged. The court denied probation and sentenced defendant to two years on the assault charge, imposed but stayed a three-year term for the great bodily injury enhancement, and imposed but stayed a two-year term on the battery causing serious bodily injury charge, for an aggregate term of two years in state prison. The court awarded defendant credit for 366 days of actual custody plus 54 days of conduct credit, for a total of 420 days of presentence custody credit. The court imposed various fees and fines, including a \$60 court facility fee (\$30 for each of the two convictions) pursuant to Government Code section 70373.

Defendant filed a timely notice of appeal.

DISCUSSION

I

Defendant contends People's exhibits 1, 6, and 9 were cumulative, irrelevant, and unduly prejudicial, and admission of those exhibits was an abuse of discretion. As we shall explain, there was no error in admitting any of the exhibits.

""The admission of allegedly gruesome photographs is basically a question of relevance over which the trial court has broad discretion. [Citation.] 'A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value.'" [Citation.]" (*People v. Mills* (2010) 48 Cal.4th 158, 191 (*Mills*)).

The People sought to admit exhibits 1 through 6 -- six different pictures of the injury sustained by Castillo.

Exhibit 1 depicts Castillo, lying on a gurney in a blood-soaked shirt with blood on his face and a wound to his forehead. Exhibit 2 is a closer depiction of exhibit 1, showing only Castillo's head and the injury to his forehead. Exhibit 4 is a close-up picture of the wound itself and little else. Exhibit 6 depicts Castillo, lying on a gurney in a blood-soaked shirt with blood on his face. The wound to his forehead is covered with gauze. The picture depicts Castillo's upper body and head and a portion of the interior of the emergency room. The trial court admitted exhibits 1, 2, and 4, but denied admission of exhibits 3 and 5 as cumulative.³ The court admitted exhibit 6 "because it's relevant for contextual purposes."

Defendant contends, as he did at trial, that exhibits 1 and 6 were prejudicial, cumulative, and "served no purpose." As we shall explain, the court exercised its discretion appropriately.

The court considered each of the six photographs offered by the People, considered argument from counsel, and admitted four photographs while excluding two as cumulative. "That the challenged photographs may not have been strictly necessary to prove the People's case does not require that we find the trial court abused its discretion in admitting them. '[P]rosecutors, it must be remembered, are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence

³ Exhibits 3 and 5 were withdrawn pursuant to the court's ruling and are therefore not part of the record.

supports the prosecution's theory of the case.' [Citation.] 'The fact that the photographic evidence may have been cumulative to other evidence does not render it inadmissible [citation], although the trial court should consider that fact when ruling on a motion to exclude evidence pursuant to Evidence Code section 352.' [Citation.] A court's ruling admitting such photographs will not be disturbed on appeal unless the court exercised its discretion in an arbitrary, capricious, or patently absurd manner. [Citation.]" (*Mills, supra*, 48 Cal.4th at pp. 191-192.) Each of the exhibits -- four in all -- depicts, from a different angle and a different aspect, the nature and extent of Castillo's injury, including the wound itself and the amount of resulting blood lost. The court did not act arbitrarily or capriciously in admitting exhibits 1 and 6.

Defendant also argues, as he did at trial, that exhibit 9 (the ratchet) was not substantially similar to the one used during the assault and "[t]hus, a proper foundation was not laid by the prosecution." We disagree. The record does not suggest that exhibit 9 was offered as the actual tool used or an identical copy of the actual tool used. Rather, it was offered as an approximation of the tool used. The differences between exhibit 9 and the ratchet used by defendant were pointed out to the jury. When Castillo regained consciousness, he saw the ratchet in defendant's hand. At trial, Castillo explained that the ratchet defendant used to strike him was similar to exhibit 9, but differed slightly in that it had a thinner handle

and did not have an adjustment ring at the head of the ratchet. Manning testified that, during the interview, defendant showed him a ratchet that was similar to, but shorter than, the one used to hit Castillo. Manning then compared exhibit 9 to the one defendant had shown him during the interview and confirmed that it appeared to be "roughly the same type of tool." Defendant was shown exhibit 9 and confirmed that it was approximately the same size as the one he used to hit Castillo. The exhibit was sufficiently close in description to the actual weapon used by defendant to avoid being prejudicial. A proper foundation was laid for exhibit 9.

The trial court did not abuse its discretion in admitting exhibits 1, 6, or 9.

II

Conceding the holding in *People v. Brooks* (2009) 175 Cal.App.4th Supp. 1, 5 that Government Code section 70373 does not violate ex post facto prohibitions, defendant claims the trial court nevertheless erred by retroactively imposing two \$30 assessments pursuant to that statute.⁴

⁴ Government Code section 70373, subdivision (a)(1) states: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463 of the Penal Code, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. The assessment shall be imposed in the amount of thirty dollars (\$30) for each misdemeanor or felony and in the amount of thirty-five dollars (\$35) for each infraction." (See Stats. 2008, ch. 311, § 6.5.)

Remarkably, the People concede the error. As we shall explain, we decline to accept the People's concession, as we find defendant's claim lacks merit.

Government Code section 70373 became effective on January 1, 2009. (See Stats. 2008, ch. 311.) Defendant cites *Strauss v. Horton* (2009) 46 Cal.4th 364 for the well-established principle that "'in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application.' [Citation.]" (*Id.* at p. 470.) He argues that his crimes occurred prior to the effective date of section 70373 and "[t]here is no express retroactivity provision nor is there any extrinsic evidence that clearly shows a legislative intent for section 70373 to have a retroactive effect."

Government Code section 70373 expressly states that a \$30 assessment is "imposed on every conviction" for a misdemeanor or felony. (§ 70373, subd. (a)(1).) While it is true defendant's crimes occurred prior to enactment of section 70373, his conviction occurred after the effective date of that statute. It is the date of conviction that determines whether the statute is being applied retroactively.

We decided earlier this year, in *People v. Castillo* (2010) 182 Cal.App.4th 1410 (*Castillo*), that a criminal conviction assessment imposed pursuant to Government Code section 70373 is analogous to a court security fee imposed pursuant to Penal Code section 1465.8 and, as such, is properly imposed on all

convictions after its operative date. (*Castillo*, at pp. 1414-1415.) “[L]ike the court security fee [imposed by Penal Code section 1465.8], the criminal conviction assessment for court facilities was enacted as part of the budgeting process. [Citation.] In [*People v.*] *Alford* [(2007) 42 Cal.4th 749], the California Supreme Court viewed such circumstance as an indication that the court security fee was meant to apply to convictions incurred after its operative date. [Citations.] The same rationale obtains here.” (*Castillo*, at p. 1414.)

Defendant has given us no reason to stray from our decision in *Castillo*. We conclude there was no error.

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

SIMS, Acting P. J.

NICHOLSON, J.